No. 83-565

IN THE

Supreme Court of the United States

October Term 1983

JAMES G. INGLIS,
Petitioner,

vs.

MILTON FEINERMAN, in his individual capacity as President of Federal Home Loan Bank of San Francisco; and FEDERAL HOME LOAN BANK OF SAN FRANCISCO, a corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court below err in ruling that: (1) Petitioner's state law claims for wrongful discharge were preempted by 12 U.S.C. § 1432(a), and (2) Petitioner's attempts to create state law rights from Respondent's employment manual were void by virtue of the doctrine of federal preemption?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff/Petitioner before this Court is James G. Inglis. The Defendants/Respondents are Milton Feinerman, in his individual capacity as President of the Federal Home Loan Bank of San Francisco, and the Federal Home Loan Bank of San Franciso, a corporation.[1]

[1]The Federal Home Loan Bank of San Francisco does not have any parent or subsidiary corporations (Supreme Court Rule 28). The Bank is under the supervision of the Federal Home Loan Bank Board. (12 U.S.C. § 1437.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 701 F.2d 97 and is set forth as Appendix A to the Petition for Writ of Certiorari (hereinafter "Appendix A"). The court of appeals' order of July 5, 1983, denying a petition for rehearing and suggestion for a rehearing *en banc*, is set

forth as Appendix B to the Petition for Writ of Certiorari (hereinafter "Appendix B"). The order of the district court granting Respondents' motion for summary judgment is not reported and is set forth as Appendix C to the Petition for Writ of Certiorari (hereinafter "Appendix C").

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Federal Home Loan Bank Act, 12 U.S.C. §§ 1421*et seq.* (particularly 12 U.S.C. § 1432(a)) and the U. S. Constitution art. VI, cl. 2 (Supremacy Clause).

STATEMENT OF THE CASE

A. Introduction.

Respondent Federal Home Loan Bank of San Francisco (hereinafter "FHLB" or "Bank"), one of 12 district banks of the Federal Home Loan Bank system, was established and is maintained pursuant to the Federal Home Loan Bank Act, 12 U.S.C. §§ 1421 *et seq.* The Bank supervises federal savings and loan associations in the states of Arizona, California and Nevada as an agent of the Federal Home Loan Bank Board of Washington, D.C. Although the Bank is a federal instrumentality,[2] its member institutions own its capital stock.

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[2]*Fahey v. O'Melveney & Myers*, 200 F.2d 420, 446 (9th Cir. 1952), *cert. denied*, 345 U.S. 952 (1953).

B. Petitioner's Termination.

On or about September 1, 1981 Petitioner James G. Inglis was terminated from his position as Vice-President and Internal Auditor of the FHLB because of his failure to adequately carry out his duties as an officer of the Bank.[3]

On October 9, 1981, Petitioner filed suit for wrongful discharge against the Bank and its President in San Francisco Superior Court. The procedural disposition of this case in the trial and appellate courts is correctly set forth in the Petition. In relevant part, this case comes before this Court from a judgment of the court of appeals affirming the district court's grant of summary judgment in favor of Respondents on Petitioner's wrongful discharge claims.[4]

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[3]Petitioner's termination was triggered by a serious breach of his duty of confidentiality which he committed on August 20, 1981. On that date Petitioner admittedly disclosed to another Bank officer, Gary L. Curley, that Curley had been promoted to the position of Senior Vice-President at a salary below the minimum provided for such a position. The disclosure to Curley was made while approval of Curley's promotion and salary by the Board of Directors of the Bank was pending and thus constituted a breach of confidentiality by the Petitioner.

When Bank President Milton Feinerman discussed the matter with Petitioner, he admitted that he had disclosed the confidential information concerning Curley's promotion, and that what he had done was wrong (ER 269). Petitioner was also criticized for a continuous series of mistakes at the Bank, evidencing the use of extremely poor judgment. During two meetings with Feinerman, Inglis was able to offer nothing in mitigation of his conduct except his past service to the Federal Home Loan Bank system. Accordingly, Feinerman informed Petitioner he was terminated (ER 269-71).

[4]Petitioner also raised below claims that his termination infringed upon his constitutionally protected "property interest" in continued employment and his constitutionally protected "liberty interest" in his good name. These claims were rejected by the district court and the court of appeals (Appendices A, C). As Petitioner has abandoned these contentions in the instant Petition, they need not be considered by this Court (Supreme Court Rule 21.1(a)).

Rather than evidencing a radical departure from case precedent in the area, as Petitioner suggests, the decisions below were firmly grounded on the familiar principles that Petitioner's claims were preempted by the "at pleasure" language of the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a), and that any purported rights under state law created by the Bank's employee handbook were void and unenforceable.

ARGUMENT AT LAW

A. Petitioner's State Law Claims Are Preempted By 12 U.S.C. § 1432(a), Which Grants The Bank The Authority To Dismiss Its Employees "At Pleasure."

The doctrine of federal preemption is basic to American jurisprudence, as it stems from the Supremacy Clause of the United States Constitution, art. VI, cl. 2. The courts have long recognized that in the field of banking, when federal law speaks in an area, state law is inapplicable to any issue that arises in that field.[5]

Congress has set forth explicit rules for the operation of the Federal Home Loan Bank system in the Federal Home Loan Bank Act, 12 U.S.C. §§ 1421 *et seq.* The statute provides that the Federal Home Loan Bank shall have the authority to dismiss its officers and employees "at pleasure":

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[5] While the most recent example of such preemption can be found in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, ___ U.S. ___, 73 L. Ed. 2d 664 (1982) (Federal Home Loan Bank Board regulations authorizing mortgage due-on-sale clauses preempt state law), other examples are numerous: *Conference of Federal Savings & Loan Ass'ns v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd*, 445 U.S. 921 (1980) (preemption by federal law regarding credit discrimination proceedings); *Meyers v. Beverly Hills Federal Savings & Loan Ass'n*, 499 F.2d 1145, 1146 (9th Cir. 1974) (Federal Home Loan Bank Board regulations preempt California statutes relating to pre-payment of loans).

> [S]uch [district Federal Home Loan] bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name . . . shall have power . . .; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transactions of its business, subject to the approval of the [Federal Home Loan Bank] board; to define their duties, require bonds of them and fix the penalties thereof, *and to dismiss at pleasure such officers, employees, attorneys, and agents;* and, by its board of directors, to prescribe, amend, and repeal bylaws, rules, and regulations governing the manner in which its affairs may be administered . . . .

12 U.S.C. § 1432(a) (emphasis added).

These provisions are similar to 12 U.S.C. § 341 (Fifth) of the Federal Reserve Act which gives the Federal Reserve Banks the power to "dismiss at pleasure such officers or employees." In a case with strikingly similar facts, the Ninth Circuit held in *Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1093 (9th Cir. 1981), *cert. denied,* 455 U.S. 948 (1982), that the preemption doctrine bars state law claims for wrongful discharge or breach of contract by employees subject to dismissal pursuant to an "at pleasure" employment statute.[6]

Here, Petitioner relies on an alleged representation in the Bank's employee handbook that he would be treated

[6]In *Bollow*, an attorney employed by the Federal Reserve Bank of San Francisco was discharged after he allegedly shouted profanities at his fellow employees. After his termination, Bollow filed suit for wrongful discharge and breach of contract based upon a letter from the Bank president promising him continued employment. The court of appeals affirmed the district court's dismissal of the action on preemption grounds. *Bollow*, 640 F.2d at 1098.

fairly and be given an opportunity to be heard on work-related problems. Recognizing that the facts in the *Bollow* case were virtually identical to those found here, the courts below ruled that: (1) 12 U.S.C. § 1432(a) of the Federal Home Loan Bank Act preempts California law and allowed the Bank to dismiss Petitioner "at pleasure," and (2) Petitioner could not state a cause of action based upon purported representations in the Bank's employee handbook, since the Bank could not lawfully limit by contract or otherwise its statutory right to dismiss its employees "at pleasure" (Appendices A, p. 4 and C, pp. 6-7).[7]

Both this case and the *Bollow* case merely illustrate the familiar principle that any federal contract or regulation in excess of statutory authority is void and unenforceable. As this Court stated in *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917):

> [T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to do what the law does not sanction or permit.[8]

Petitioner also argues that under California tort law he could not be discharged for reasons contrary to public policy. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167,

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[7]Petitioner admits that his rights purportedly created by the Bank's handbook were *contractual* in nature (Petition p. 13).

[8]*See also Schweiker v. Hansen*, 450 U.S. 785 (1981); *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 449 (11th Cir. 1982) (federal government not bound by contract which was not authorized under federal regulations); *Sims v. Fox*, 505 F.2d 857 (5th Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 1011 (1975) (Air Force regulations or contracts attempting to limit the authority of the Air Force to dismiss its reserve officers "at pleasure" void and unenforceable); *Armano v. Federal Reserve Bank of Boston*, 468 F. Supp. 674 (D. Mass. 1979) (employment contract of Federal Reserve employee void and unenforceable as it purported to require just cause for dismissal).

172 (1980); *Petermann v. International Brotherhood of Teamsters,* 174 Cal. App. 2d 184 (1959).[9] As correctly recognized by the courts below, state law cannot be used to interfere with the Bank's statutory right to dismiss its employees "at pleasure."[10]

Nor can Petitioner prevail on his newly raised argument that the Bank is estopped from allegedly failing to abide by its employee handbook. As this Court has repeatedly held, the United States is not estopped by acts of its officers or agents in excess of their statutory authority. *Utah Power & Light Co. v. United States,* 243 U.S. 389, 409 (1917); *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380, 384-85 (1947).

Petitioner also cites several cases to the effect that "agencies" of the federal government are under an obligation to follow their own lawfully promulgated regulations (Petition p. 12). However, even if the Bank were a federal "agency," it could not limit through regulation its authority to dismiss its employees "at pleasure" without exceeding its statutory authority set forth in 12 U.S.C. § 1432(a). *Sims v. Fox,* 505 F.2d 857 (5th Cir. 1974).[11] Moreover, the

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[9]A number of states have not adopted the "public policy" exception to the "at will" employment doctrine. *See* M.S. Dichter and A.J. Gross, *A Survey Of Wrongful Discharge In The Continental United States,* American Bar Association Section on Litigation (1982). If Petitioner's position were adopted, the Bank would be subject to potentially conflicting state laws in the three-state area within which it operates – the very evil which the preemption doctrine is designed to prevent.

[10]There is not any conflict among the circuit courts in this area, as suggested by Petitioner, since none of the cases cited in footnote 2 of the Petition involved preemption by a federal "at pleasure" dismissal statute such as found here.

[11]In *Vitarelli v. Seaton,* 359 U.S. 535, 539 (1959), Executive Order No. 2738 required that employees dismissed on security grounds be afforded specific and extensive procedural protections. Any attempt to

cases cited by Petitioner involve governmental agencies which promulgated regulations which were published in the Federal Register pursuant to their rule-making authority or pursuant to an Executive Order. Petitioner has cited no cases to the effect that the provisions of a personnel manual of a federal instrumentality, such as the Bank, not codified in federal regulations, are in any way binding. Indeed, by categorizing his claims as "contractual" in nature, Petitioner concedes that his case is distinguishable from those cited on page 12 of the Petition.[12] For example, *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C. Cir. 1977), involved HEW regulations which contained detailed procedures for the termination of employees (these regulations are reprinted as "Appendix A" to the *Mazaleski* opinion at 726). In contrast, the Bank's employee handbook is an internally generated document written by the Bank's management which speaks in very general terms concerning the rights of employees to be heard. As recognized by the district court, there are no specific procedural requirements in the Bank's

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circumvent the provisions of this Executive Order would have been unlawful. In *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C. Cir. 1977), while Executive Order No. 11,140 allowed the Public Health Service to dismiss its officers without their consent, it also required that terminations be carried out in accordance with regulations promulgated by the Secretary of the Department of Health, Education and Welfare ("HEW"). *Mazaleski*, at 723, Bazelon, J., concurring in part and dissenting in part. Here, the Federal Home Loan Bank Act grants the Bank plenary authority to dismiss its employees "at pleasure" without any such limitations.

[12] *Vitarelli v. Seaton*, 359 U.S. 535 (1959), involved Executive Order No. 2738, which was published in 18 Fed. Reg. 2485 (1953). *Associated Builders v. U.S. Dept. of Energy*, 451 F. Supp. 281, 286-87 (S.D. Tex. 1978) involved Department of Labor Regulations found in 29 C.F.R. subtitle A promulgated pursuant to the Davis-Bacon Act (40 U.S.C. §§ 276(a) *et seq.*).

handbook which the Bank could have followed but did not (ER 342).[13]

[13]The handbook does not purport to limit the ability of the Bank to dismiss its employees "at pleasure." In fact, the handbook specifically states that an employee's breach of confidentiality is grounds for *immediate dismissal* (ER 178-179).

But, assuming, *arguendo,* that the Bank was required to comply with the termination guidelines and that it failed to do so, the Petitioner's remedy would be an order that it comply with these procedures. *Vitarelli v. Seaton,* 359 U.S. 535, 546 (1959). Petitioner does not request that the Bank comply with the procedures in its employee handbook but rather seeks compensatory and punitive damages. Thus, dismissal of such claims was proper.

CONCLUSION

Petitioner has not articulated a valid ground under Supreme Court Rule 17 that would warrant the granting of his Petition for Writ of Certiorari. There is no conflict among the courts in this area, as it is well established that (1) federal law preempts state law and allows the Bank to dismiss its employees "at pleasure," and (2) any alleged contractual obligations of the Bank which purported to limit the Bank's right to dismiss its employees "at pleasure" would be *ultra vires* and thus void. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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